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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1245

SAMUEL OKIN,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SAMUEL OKIN,
Attorney for Petitioner,
No. 32 Broadway,
New York City.

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(1) Whether an aggrieved investor affected directly and adversely by an order of the Commission approving a plan under Section 11(e) of the Act and authorizing the use of $44,000,000 of his company's assets, can be deprived of his statutory authority under Section 24(a) of the Act to have a Circuit Court of the circuit wherein he resides or has his principal place of business, review the said Commission order and grant the mandatory relief therein provided for, by the Commission immediately after entering its said order applying to a distant District Court for an order, at the request of the declarant companies, enforcing and carrying out the said plan, is a vitally important Federal question drastically affecting the interests of millions of investors scattered all over the United States who have billions of dollars invested in companies subject to the regulations of the Act, is a question which seriously involves the administration of the Act, has not been but should be settled by this Court 25

(2) The Court below in dismissing the petition for review on the ground that the institution

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SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Samuel Okin prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review the decree of that Court entered in the above-entitled cause on December 30, 1944, dismissing the petition of the said Samuel Okin filed with that Court by the petitioner as an aggrieved person, pursuant to Section 24(a) of the Public Utility Holding Company Act of 1935, for a review of the order of the Securities and Exchange Commission dated the 7th day of September, 1944, pertaining to the United Gas Corporation, Electric Bond and Share Company and Electric Power &

Light Corporation, and that said order and each and every part thereof pertaining to said companies be set aside; and that the Court make an order under said Section 24 (a) granting leave to said petitioner to adduce the additional evidence which he sought to adduce upon the hearing before the said Commission but was prevented by the rulings of the Commission's Trial Examiner as thereafter sustained by the said Commission order and directing that such additional evidence, which is material and necessary be taken before the said Commission.

Jurisdiction

The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5; 15 U. S. C. sec. 79x(a)) and Section 240(a) of the Judicial Code, as amended (28 U. S. C. sec. 347(a)). The order of the Court below granting the Commission's motion to dismiss the petition for review was entered on December 30, 1944 (R. 101). On March 27th, 1945, Mr. Justice Jackson, on cause shown, made an order extending to April 29th, 1945 the period during which a petition for writ of certiorari might be filed with respect to the said order of the Court below, and on April 26th, 1945, Mr. Justice Jackson, on cause shown, extended said period to May 8th, 1945 (R. 102-103).

The Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit was rendered on October 24, 1944 and is reported at 145 F. (2d) 206.

The opinion of the Securities and Exchange Commission (hereinafter referred to as the Commission) rendered September 7th, 1944, the order of the Commission of the same date, have not yet been officially reported. The order of the Commission is attached as Appendix A to the Brief annexed hereto.

Statute Involved

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. sec. 79), hereinafter referred to as the "Act". The portions of that Act which are directly involved are Sections 24(a), 25 and 11 and other sections which are attached as Appendix B to the Brief annexed hereto.

Statement

Petitioner is the owner of Nine thousand (9,000) shares of the common stock of Electric Bond and Share Company (hereinafter referred to as Bond and Share) of a total of 5,250,357.66 shares of common stock outstanding, and petitioner is one of the largest individual stockholders of record of a total of approximately 90,000 scattered all over the United States, Central and South America, Canada, Europe and elsewhere (R. 1).

Said 9,000 shares of common stock owned by petitioner has a market value of approximately $115,000 and it is petitioner's opinion that said stock has an actual value of approximately $250,000 (R. 1).

During 1930 and 1931 Bond and Share loaned to the United Gas Corporation (hereinafter referred to as United Gas) the sum of $25,925,000 in cash for which United Gas in December, 1931, made and delivered to Bond and Share its 6% demand note in the sum of $25,925,000, no part of which principal sum had been paid up to the time of the filing of the said petition in the Court below, and the interest thereon had been paid at fixed periods in the past (R. 2).

Bond and Share in 1935 loaned to United Gas the sum of $3,000,000 in cash, at 6% interest, no part of which principal sum had been paid up to the time of the filing of the said petition, except the sum of $1,000,000 which

left an unpaid balance of $2,000,000, the interest on which had been paid at fixed periods in the past (R. 2).

United Gas in 1936 owned $25,000,000 principal amount of 6% bonds of its subsidiary, United Gas Public Service Company, which United Gas then sold to Bond and Share and received therefor the sum of $25,000,000 in cash together with accrued interest on said bonds. Thereafter the said United Gas Public Service Company was merged with United Gas which assumed the payment of the aforesaid bonds. No part of the said principal sum of $25,000,000 had been paid up to the time of the filing of the said petition in the Court below, and interest thereon had been paid at fixed periods in the past (R. 2).

Bond and Share purchased in the open market prior to 1935 $440,000 principal amount of 5% First Mortgage Gold Bonds of the Houston Gas Securities Company, a subsidiary of United Gas, at a cash cost to Bond and Share of $309,920. Thereafter Houston Gas Securities Company was merged with United Gas which assumed the payment of said bonds, no part of which principal sum had been paid at the time of the filing of the said petition in the Court below, and the interest on which had been paid at fixed periods in the past (R. 3).

By reason of the aforesaid, United Gas at the time of the filing of the said petition was indebted to Bond and Share in the sum of $53,365,000, no part of which principal sum having been paid at that time (R. 3).

In addition to the foregoing, Bond and Share at that time owned the following securities of United Gas; 17,310 shares of $7 preferred stock, representing a cash cost to Bond and Share of $1,594,913.83 and which then had a market value of approximately $1,990,650; 752,666 shares of common stock, which then had a market value of approximately $1,300,000, of which 278,325 shares of common stock was acquired by Bond and Share at a book cost of $3,955,900 representing the capital stock

liability of Bond and Share with respect to 39,559 shares of its $6 preferred stock issued for said 278,325 shares of common stock and $309,075.87 represented the cash cost of other shares of the said common stock; and 151,005 option warrants for the purchase of common stock (R. 4).

Bond and Share, a New York corporation, is a registered holding company under the Act. Electric Power & Light corporation, a registered holding company under the Act, was at the time of the filing of the said petition in the Court below, the owner of all the 884,680 shares of $7 second preferred stock of United Gas which represented a capital stock liability of $88,468,000, and also owned 3,795,086 shares (48.54%) of the common stock of United Gas and 3,600,040 option warrants (73.99%) of said corporation. As of June 1, 1944, the arrearages on said second preferred stock of United Gas amounted to $85.75 per share or a total of $75,861,310 on the said 884,680 shares (R. 4).

Bond and Share owns the following securities of Electric Power & Light Corporation (hereinafter referred to as Electric) which represents a carrying value to Bond and Share as shown by its books, of the sum of $36,606,915.55, of which sum $34,105,016.18 represents cash cost and $2,583,750 represents the portion acquired from Electric Investors, Inc., and which securities are as follows: 485 shares (.09%) of the $7 preferred stock; 13,905 shares (18.43%) of the $7 second preferred stock; 1,976,638 shares (57.25%) of the common stock; and 393,408 warrants; which said securities held by Bond and Share represent 46.84% of the total voting power represented by all the securities of Electric. Electric is a statutory subsidiary of Bond and Share and United Gas is a statutory subsidiary of Electric. Bond and Share controls Electric which in turn controls United Gas (R. 4).

In May, 1941 (R. 5), United Gas and certain of its subsidiaries filed a declaration with the Commission seeking

approval for the issuance and sale by United Gas of $75,000,000 principal amount of First Mortgage and Collateral Trust Bonds, 3¼% series due 1958, to 14 insurance companies at a price of 99.34. United Gas proposed in its said declaration to use the net proceeds of such sale as follows (R. 5):

> (1) To retire $28,850,000 principal amount of United Gas Public Service Company debentures 6% due July 1, 1953, assumed by United Gas; $25,000,000 principal amount of which was held by Bond and Share and $3,850,000 principal amount was held by Houston Gas Securities Company, all of whose capital stock was then owned by United Gas.
>
> (2) To pay the 6% demand note of United Gas in the principal amount of $25,925,000 held by Bond and Share.
>
> (3) To repay an open account indebtedness of $2,000,000 to Bond and Share.
>
> (4) To purchase $6,000,000 principal amount of First Mortgage and Collateral Trust Bonds, 4% series due 1961 to be issued by United Gas Pipe Line Company.

The declaration of United Gas (File No. 70-314) stated that its management was considering recommending the use of a substantial portion of the remaining proceeds for payment of the dividend arrearages on the $7 preferred stock of United Gas, then amounting to $9,502,490 (as of May, 1941), but which was subsequently reduced as of November 1, 1944, to the sum of $3,263,303, by dividends declared on account of arrearages (R. 6).

Simultaneously, in May, 1941, Bond and Share filed with the Commission its declaration (File No. 70-315) wherein it sought permission to use the said sum of approximately $53,365,000 which it was to receive from

United Gas under its declaration, hereinbefore referred to, together with approximately $6,000,000 from its own treasury to reduce its outstanding preferred stock, on any basis available, whether it be by invitation or tenders, purchases in the open market, pro rata payment in liquidation, or by any other appropriate method (R. 6).

As of December 31, 1943, Bond and Share had outstanding $94,944,700 of its $6 preferred stock which had been reduced by market purchases to $90,072,900 as of May 27, 1944; and had outstanding on December 31, 1943, $24,599,700 of its $5 preferred stock which had been reduced to $22,530,000 by market purchases as of May 27, 1944 (R. 6).

On May 31, 1941, the Commission issued its Notice and Order for Consolidated Hearings wherein it was directed that the hearings with respect to the declarations of the aforesaid United Gas and its subsidiaries (File No. 70-314) and Bond and Share (File No. 70-315) be consolidated with the proceeding previously instituted by the Commission against Bond and Share, Electric, United Gas, and certain of its subsidiaries under sections 11(b)(2), 12(b), (12(c) and 12(f) of the Act (File No. 59-21) and also the proceeding commenced by the said Commission by the same order entitled In the Matter of Investigation of organization and financing of United Gas Corporation and its subsidiaries under sections 18(a) and 18(b) of the Act (File No. 4-33) (R. 6).

The said consolidated proceeding hearing continued until about the month of January, 1942, when the management of Bond and Share agreed, after conferences with the staff of the Commission and officers of United Gas, that the Bond and Share claims of $52,925,000 against United Gas, hereinbefore more fully referred to, should be subordinated to new bonds in the aggregate amount of $70,000,000 intended then to be issued by United Gas and sold to the said 14 insurance companies. It was intended

by the said management of Bond and Share to permit United Gas to use the proceeds of the said bond issue of $70,000,000 to redeem the first preferred stock of the debtor, United Gas, pay a premium for redemption and arrearages thereon, all of which would then have amounted to approximately the sum of $55,000,000. When petitioner learned of the foregoing, he made strenuous protests and succeeded in stopping this intended subordination (R. 7).

On June 8th, 1942, the consolidated hearing was reconvened by order of the Commission, further testimony was taken therein until September, 1943, when the said hearing was completed and concluded with respect to all matters except the accounts and structures of certain subsidiary companies of United Gas. Pursuant to leave granted by the Commission's Trial Examiner, petitioner participated in the said reconvened hearing and cross-examined witnesses therein (R. 8, 9).

Following the close of the said record as aforesaid various discussions took place between the staff of the Commission, officers of Bond and Share and United Gas and Electric, and their counsel, wherein the staff of the Commission, in violation of their statutory duties under the Act and contrary to its mandates, sought to unlawfully influence the officers and directors of Bond and Share to substantially reduce the Bond and Share claims of $53,365,000 against United Gas and to surrender the valuable stock interests in United Gas owned by Bond and Share which then had a market value of approximately $3,300,000 (R. 8). When during the course of said conferences, the officers and directors of Bond and Share either refused to accede to the demands of the Commission's staff, as aforesaid, or else suggested that the Commission's staff first take some affirmative action before the management of Bond and Share would accede to the said demands of the Commission staff, thereafter and on or about the 3rd day of November, 1944, the said Commission staff filed with

the Commission and caused to be served upon the attorneys for Bond and Share, United Gas and Electric, proposed Findings of Fact, Conclusions of Law and Recommendations which were deliberately kept from petitioner as a participant in the said consolidated proceedings, but in which recommendations the said staff of the Commission requested that the Commission immediately enter an order prohibiting all payments of interest and principal on the debt claims of Bond and Share against United Gas.

It was these proposed Findings of Fact, Conclusions of Law and Recommendations, filed as aforesaid by the Commission's staff, which in November, 1943, compelled the officers and directors of Bond and Share to accept the ultimatum of the Commission's staff that Bond and Share accept $44,000,000 for its claims against United Gas aggregating $53,365,000 and the securities of United Gas owned by Bond and Share, as aforesaid, which then had a value of approximately $3,300,000, or else the said Commission's staff threatened to apply to the Commission for the said order prohibiting all payments of interest and principal on the aforesaid debt claims, pending the determination of the issues in the proceedings pending before the Commission and in said proposed Findings and Opinion the said staff of the Commission further recommended that the Commission find and order the subordination of the claims of Bond and Share against United Gas and its stock interests therein to that of all the publicly held stock in United Gas including the stock therein owned by Electric, as aforesaid.

Not only were the aforesaid proposed Findings of Fact, Conclusions of Law and Recommendations kept from petitioner by specific direction of the Commission, not only were the aforesaid conferences held privately after the close of said hearings and petitioner not given any opportunity to participate therein, but thereafter when Bond and Share decided to meet the demands of the

Commission staff and accept the sum of $44,000,000 for its claims and securities, as aforesaid, a result which probably was influenced by what members of the Commission may have privately told the officers and directors of Bond and Share; the Commission directed that the copies of the said proposed Findings and Opinion and Recommendations and proposed Order be returned by the attorneys for the parties upon whom they had been served and that the said documents be withdrawn from the records of the Commission.

Pursuant to said private arrangements made by the Commission staff with the officers and directors of Bond and Share, United Gas and Electric, and their attorneys, as aforesaid, and shortly prior to the 6th day of March, 1944, United Gas filed with the Commission what is claimed to be a plan of reorganization of said United Gas under the provisions of Section 11(e) of the Act, which said alleged plan was joined in by Bond and Share and Electric, wherein the following was proposed (R. 9):

> (1) United Gas Corporation would file an amendment to its previously described filing herein (File No. 70-314) in which amendment it would seek approval of the issuance and sale of the sum of $100,000,000 principal amount of First Mortgage and Collateral Trust Bonds.
>
> (2) Electric Power & Light Corporation would acquire from Electric Bond and Share Company for a cash purchase price of $44,000,000 the following claims in and against United Gas Corporation held by Electric Bond and Share Company:
>
> > (a) $25,000,000 principal amount of 6% debentures, due 1953, of United Gas Public Service Company assumed by United Gas Corporation.
> >
> > (b) The 6% demand note of the United Gas Corporation in the principal amount of $25,925,000.

(c) The 6% open account indebtedness from United Gas Corporation to Electric Bond and Share Company of $2,000,000.

(d) $440,000 principal amount of 5% Collateral Trust Gold Bonds of Houston Gas Securities Company assumed by United Gas Corporation.

(e) 17,310 shares of $7 preferred stock, 752,666 shares of common stock, 151,005 option warrants for the purchase of common stock of United Gas Corporation.

(3) Electric Power & Light Corporation would surrender to United Gas Corporation as a capital contribution the 17,310 shares of $7 preferred stock of United Gas Corporation acquired by it from Electric Bond and Share Company in the transaction described in paragraph (2) above and United Gas Corporation would cancel the said shares.

(4) United Gas Corporation would redeem and cancel the 432,512 shares of $7 preferred stock held by the public at their redemption price of $110 per share plus accumulated dividends thereon to the redemption date, employing for such purposes so much of the proceeds of the sale of its First Mortgage and Collateral Trust Bonds as may be necessary therefor (approximately $53,000,000).

(5) United Gas Corporation would declare and pay a dividend on its $7 second preferred stock, all of which was held by Electric Power & Light Corporation of 12,385,520 shares of its $1 par value common stock, and Electric Power & Light Corporation would accept such stock dividend in payment of $12,385,520 of the accumulated and unpaid dividends on such stock.

(6) Electric Power & Light Corporation would surrender to United Gas Corporation for cancellation

444,680 shares of United Gas Corporation's $7 second preferred stock together with all rights to accumulated undeclared dividends thereon and would receive in exchange therefor 44,468,000 shares of the $1 par value common stock of United Gas Corporation.

(7) United Gas Corporation would purchase from Electric Power & Light Corporation for $44,000,000 in cash, its remaining 440,000 shares of second preferred stock having a stated value of $44,000,000 and Electric Power & Light Corporation would also transfer to United Gas Corporation the right of Electric Power & Light Corporation to accumulated and unpaid dividends on such stock. United Gas Corporation would derive the $44,000,000 in cash from the proceeds of its sale of First Mortgage and Collateral Trust Bonds and Electric Power & Light Corporation would use the $44,000,000 received by it to discharge its obligation arising in connection with its acquisition of securities of United Gas Corporation from Electric Bond and Share Company as described in paragraph (2) above.

(8) Electric Power & Light Corporation would surrender to United Gas Corporation as a capital contribution the securities and open account indebtedness of United acquired by Electric Power & Light Corporation from Electric Bond and Share Company as described in paragraph (2) above (exclusive of the 17,310 shares of United Gas Corporation's $7 preferred stock previously surrendered as described in paragraph (3) above) together with option warrants for the purchase of 3,600,040 shares of the common stock of United Gas Corporation.

(9) United Gas Corporation would pass a resolution entitling its common stockholders to two-thirds of a share of common stock for each share of such stock

then held and, in connection therewith, would cause to be transferred from capital surplus to stated capital the sum of $42,613,209 to cover the capital liability to be represented by the additional shares of stock so to be issued and to render such shares fully paid and non-assessable.

(10) United Gas Corporation would use the remaining proceeds of the sale of its First Mortgage and Collateral Trust Bonds together with such additional cash and in its treasury as may be necessary to redeem and cancel $3,460,000 principal amount of publicly held 5% Collateral Trust Gold Bonds of Houston Gas Securities Company, due March 1, 1952, assumed by United Gas Corporation.

(11) United Gas Corporation would amend its certificate of incorporation so as to eliminate the authorization of the $7 preferred stock and the $7 second preferred stock and to reclassify the 106,533,022 shares of then outstanding $1 par value common stock into 10,653,302.2 shares of $10 par value common stock and would exchange the certificates for the new shares of common stock for the certificates for the outstanding common stock on the basis of 1 share of new stock for 10 shares of old stock. Provisions were then made as to fractional shares of stock and for the revocation of outstanding option warrants for the purchase of common stock of United Gas Corporation and for their abrogation and cancellation and non-participation in the plan.

On the 6th day of March, 1944, the Commission issued its Notice of Filing of Section 11(e) Plan and Application or Declaration (or both) under Section 12(c), Order of Consolidation and Notice of and Order for Hearing wherein the said Commission ordered that the proceedings with respect to said plan filed pursuant to Section 11(e) of the Act, and the said application or declaration

(or both) filed by Bond and Share for the use of the said sum of $44,000,000 to be received by it, and the pending consolidated proceeding, hereinbefore referred to (File Nos. 70-314, 70-315, 59-21, 4-33) be consolidated to the extent of consideration by the Commission of the issues involved, and the record in the pending consolidated proceedings be incorporated in the consolidated proceedings directed under the order of March 6th, 1944 (R. 13).

The said order of the Commission dated the 6th day of March, 1944, ordered that a hearing be held in the consolidated proceeding on the 4th day of April, 1944, before one of its Trial Examiners and that all persons desiring to be heard or otherwise wishing to participate in the proceedings should notify the Commission in the manner provided by its rules of practice, Rule XVII, on or before April 1, 1944 (R. 13); and the said order ordered United Gas, Electric and Bond and Share to give notice of the said hearing to all their security holders (insofar as the identity of such security holders was known or available to them) by mailing to each of said persons a copy of the Commission said Notice and Order for Hearing at his last known address at least 20 days prior to the date of the said hearing (R. 15):

The Commission in its order dated March 6th, 1944, provided (R. 13):

> "IT IS FURTHER ORDERED that without limiting the scope of the issues presented in the consolidated proceedings particular attention would be directed at the hearings to the following matters and questions in addition to those stated in the order of this Commission referred to above, dated May 31, 1941:
>
> 1. Whether the Plan as submitted or as hereafter modified is necessary to effectuate the provisions of Section 11(b) of the Act.
>
> 2. Whether the proposed plan as submitted or as hereafter modified is fair and equitable to the persons affected thereby.

3. Whether the proposed acquisition of shares of its preferred stocks by Bond and Share, and the method proposed therefor, is appropriate and in the public interest and in the interest of investors, and in conformity with the standards of Section 12(c) of the Act.

4. Whether, if the transactions proposed are authorized by the Commission, it is appropriate in the public interest and in the interest of investors and consumers that any terms and conditions be imposed in connection with such authorization and, if so, what such terms and conditions should be.

5. Whether the fees and expenses proposed to be paid in connection with the consummation of the Plan and all transactions incidental thereto are for necessary services and are reasonable in amount.

6. Whether the Commission shall, in accordance with the petition of the parties to the Plan, take and exercise jurisdiction to fix and determine the amounts of the payments, if any, to be made by United or Electric to the plaintiffs or their attorneys in the legal proceedings specifically enumerated in the Plan, by way of reimbursement or disbursements or allowances for legal service and, if so, what action it should take in the exercise of such jurisdiction.

7. Whether the accounting entries in connection with the proposed transaction are in conformity with the standards of the Act and Rules promulgated thereunder.

8. Generally, whether the proposed transactions are in all respects in the public interest and in the interest of investors and consumers and consistent with all applicable requirements of the Act and Rules thereunder."

Pursuant to the said order of the Commission dated the 6th day of March, 1944, as aforesaid, petitioner received by mail a copy of the said order of the Commission together with a copy of the plan and a copy of the letters with respect thereto which were being sent by the said Bond and Share, Electric and United Gas, to their respective stockholders. Pursuant to the order of the Commission and the applicable provisions of the Act and the Rule of the said Commission purporting to have been promulgated thereunder, petitioner filed with the said Commission his application for intervention in the said consolidated proceedings which said application contained the following statements by petitioner after stating in substance many of the facts hereinbefore referred to as to the matters involved (R. 15):

> "It was deponent who strenuously objected to the proposed subordination of the obligations due Electric Bond and Share Company from United Gas Corporation, as hereinbefore described, and who succeeded in stopping such proposed subordination.
>
> At the request of Electric Bond and Share Company, on September 21, 1943, a hearing was held in said consolidated proceeding for the purpose of taking the testimony of Ralph B. Feagin, who was the active president of the United Gas Corporation from June 3, 1930 until the spring of 1933, and testified at great length as to transactions between Electric Bond and Share Company, the United Gas Company, and the United Gas Corporation resulting in the present indebtedness of the United Gas Corporation to the Electric Bond and Share Company other than $2,000,000 loan. It is deponent's opinion that the said testimony of the said Feagin uncontradicted in the record is conclusive proof of the absolute validity of the said present indebtedness of the United Gas Corporation to the Electric Bond and Share Company.

On the 21st day of September, 1943, the said consolidated hearing was *again* closed and although deponent requested permission of the Securities and Exchange Commission shortly thereafter to argue the matters, deponent was informed in substance that no determination had been made as to the procedure to be followed in this matter. At no time prior to the 6th day of March, 1944, was any order made by the Commission as to the matters which had been the subject matter of the said consolidated proceeding determining the same insofar as the said Commission had any jurisdiction, but on the contrary in apparent continuation of the efforts of the staff of the Commission to unjustly and illegally, in deponent's opinion, prevent payment of what deponent is fully satisfied is the absolute and unqualified obligations of United Gas Corporation to Electric Bond and Share Company, it now appears that various discussions have been held by the staff of the Commission with officers of the Electric Bond and Share Company, Electric Power & Light Corporation and United Gas Corporation, as a result of which there has been filed with the Commission a plan joined in by United Gas Corporation, Electric Power & Light Corporation and Electric Bond and Share Company, wherein among other things it is contemplated in some wholly indirect and what would appear to be detrimental manner, that Electric Bond and Share Company receive $44,000,000 for its holdings of $53,365,000 of debt securities of United Gas Corporation, 17,310 shares of $7 preferred stock, 752,666 shares of common stock and option warrants to purchase 151,005 shares of common stock, of the United Gas Corporation. The securities other than the debt securities on March 6th, 1944, had a current market value of $3,900,000. If such a proposed transaction is consummated, it will result in the reduction of surplus of the Electric Bond and Share Company of $23,770,000.

* * * * * * * * * *

It is deponent's opinion not only that this proposed plan is in its entirety highly objectionable to Electric Bond and Share Company, in that it contemplates what deponent considers the making of a gift by Electric Bond and Share Company of assets having a present value in deponent's opinion of approximately $13,000,000; but in addition the mechanics of the proposed plan are so highly detrimental to Electric Bond and Share Company and its stockholders, that the grave legal problem will arise as to the right of Electric Bond and Share Company's officers and directors to permit United Gas Corporation to purchase 440,000 shares of the second preferred stock of United Gas Corporation for the sum of $44,000,000. The next substantial question of law presented would be what right legally the Electric Power & Light Corporation and its officers and directors have to take $44,000,000 acquired by that company and turn the same over to Electric Bond and Share Company for certain assets of that company which it is contemplated to surrender to United Gas Corporation. If deponent was of the belief that the so-called master minds who have been obviously responsible for the creation of this plan, would alone sustain the losses which deponent is firmly convinced would arise thereby, deponent might look at the matters in a different light, but since deponent realizes that only Electric Bond and Share Company and its stockholders are the real victims of the activities of the staff of the Securities and Exchange Commission and acquiesced in by the management of the Electric Bond and Share Company under the proposed plan, deponent is determined to prevent such occurrences.

The proposal of Electric Bond and Share Company to use $44,000,000 in purchasing on the New York Curb Exchange its preferred stock, when at the present time it has unexpended approximately

$10,000,000 in cash and securities which the Commission authorized for such use, is too absurd to even be the subject matter of any comment. This merely illustrates again the obvious determination of the management of Electric Bond and Share Company not to employ the customary method of tenders even though the preferred stocks of the company are presently selling above 90. The earned surplus of the company is being continuously substantially reduced as a result of payment of preferred dividends and yet the management with the approval of the Commission, heretofore given, continues to employ only purchases on the New York Curb Exchange which in deponent's opinion is most detrimental. The plan recites that Electric Bond and Share Company joins in the said plan upon the further condition that the Commission, concurrently with or prior to its approval of the plan, issues its order making effective the declaration or application filed by Electric Bond and Share Company, for the use by it of all or any part of the $44,000,000 received by it from Electric Power & Light Corporation in the acquisition and retirement of its preferred stock. It is important to note however that in the declaration, Electric Bond and Share Company also seeks the right to use all or any part of the unexpended portion of such cash in connection with any other plan for the reduction of its outstanding preferred stock which may hereafter be submitted by the company to the Commission and approved by it. Since no such plan accompanies the declaration it is obvious that no such plan can be approved by the Commission as part of the declaration. Therefore it is impossible to conceive how the Commission can on the present declaration of Electric Bond and Share Company approve the same.

To completely present all the objections which deponent has to the above entitled presently consolidated proceeding would cause this affidavit to be extremely voluminous, and deponent therefore is not attempting to state all his objections and wants it specifically understood that the foregoing does not represent all his objections.

Deponent's experience before the Securities and Exchange Commission in the past, and the facts as appearing in this matter, have fully proven to deponent that the only person upon whom deponent can rely in these proceedings to protect his substantial interests as a stockholder of Electric Bond and Share Company is deponent, and that by reason of the aforesaid it is most essential to the interests of deponent that he be permitted to intervene in these proceedings to the extent that he has not been granted participation heretofore, so that he may take the necessary precautions to protect his interests herein."

On the 4th day of April, 1944, a Trial Examiner of the Commission granted to petitioner the right to participate in the said consolidated proceedings which included leave to call and examine witnesses, to offer documentary evidence and to cross-examine witnesses; and petitioner thereafter participated in the said consolidated proceeding before the Commission and cross-examined witnesses produced by the United Gas Corporation, Bond and Share, and Electric and alleged claimants in said consolidated proceedings (R. 20).

During the course of the said consolidated proceedings, petitioner was compelled to make a motion before the Commission on or about April 12, 1944 to set aside rulings of the said Trial Examiner to which exceptions were duly taken and which rulings frustrated the efforts of petitioner to protect his substantial interest and to elicit

the proof of which petitioner sought to elicit to substantiate his objections to the matters which were the subject matter of the said consolidated proceeding, and which rulings it is petitioner's opinion deprived him of his property rights without due process of law in violation of the Constitution of the United States and in violation of the provisions of the Act and its expressed intent and purpose. The said motion is more fully referred to in the petition in the Court below (R. 21).

While in the midst of a cross examination of a witness in said consolidated proceeding, petitioner was directed by the Trial Examiner to cease asking the witness any further questions, to which direction petitioner took due exception and refrained from asking any further questions because of inherent threats that he would be excluded from the hearing if petitioner insisted in propounding his questions. Petitioner made proper application to the Commission to reverse these rulings, and the Commission's determinations with respect to same are also the subject matter of the petition in the Court below (R. 39).

At about 5:30 P. M. on a Friday afternoon, while petitioner was in the midst of cross-examining a witness in said consolidated proceeding, the hearing was recessed until 8 P. M. during which recess petitioner became seriously ill, requested an adjournment until the following Tuesday and was compelled to immediately leave the hearing room without waiting for the Trial Examiner's ruling. The following Monday, petitioner learned that the Trial Examiner on the preceding Friday night, when petitioner became suddenly ill as aforesaid, denied petitioner's request for the short adjournment, permitted the termination of the incomplete cross-examination of the witness theretofore commenced by petitioner, as aforesaid, permitted other witnesses to be examined in petitioner's absence, adjourning the hearing late that evening to the next day, Saturday, when again witnesses were examined and cross-examined in petitioner's absence due to his illness as

aforesaid. Petitioner thereafter sought relief from the Commission with respect to said Trial Examiner's rulings, as hereinafter referred to, and these matters are also the subject matter of the petition in the Court below (R. 39).

On the subsequent oral argument before the Commission, petitioner opposed the proposed transaction wherein Electric Bond and Share Company contemplated selling to Electric Power & Light Corporation for the sum of $44,000,000., assets consisting of claims against United Gas having a value of approximately $56,665,000., which said $44,000,000 it was intended was to be received by Electric from United Gas by the latter purchasing from Electric 440,000 shares of $7 second preferred stock of United Gas for the sum of $44,000,000., which would be part of the proceeds of the sale of the $100,000,000 bond issue by United Gas. Petitioner also objected to the use of the $44,000,000 for the purchase of any second preferred stock of Electric. Petitioner further objected to the proposal of Bond and Share that it only use the open market as a place to purchase its preferred stock instead of also including tenders as a means of such acquisition. On said argument petitioner questioned the jurisdiction of the Commission with respect to the proposed plan of United Gas under Section 11 of the Act since said company's principal business is that of a public utility company. This matter is more fully referred to in the petition in the Court below (R. 41).

The Commission's order of September 7, 1944 (Appendix A) approved the said plan of United Gas, ordered Commission counsel to make application forthwith on behalf of the Commission to an appropriate District Court pursuant to sub-section (f) of Section 18 of the Act to enforce and carry out the terms and provisions of the plan; further ordered that the Commission order shall not be operative to authorize the consummation of any of the transactions proposed in the plan until an appropriate District Court shall, upon application of Commission, enter an order en-

forcing the plan approved; and permitted the declaration of Bond and Share with respect to the acquisition of its preferred stock by use of the said sum of $44,000,000 to become effective, subject to the terms and conditions specified in said order (R. 62-71).

Petitioner on September 20, 1944 sought review of the said Commission order and for mandatory relief as provided in Section 24(a) of the Act (R. 1-54).

The stockholders of Bond and Share by the said order of the Commission have been deprived of approximately $13,000,000. The petitioner personally has sustained a loss of approximately $25,000.

On September 8th, 1944 the Commission filed with the United States District Court for the District of Delaware a petition which requested among other things an order approving the plan as fair and equitable and as appropriate to effectuate the provisions of Section 11(b) of the Act (R. 72-79). The District Court on September 8th, 1944 made an order (R. 80-82) directing a hearing on September 29th, 1944 with respect to said petition on which day petitioner appeared before said District Court and objected to the jurisdiction of the Court pending the hearing and determination of the review proceeding in the Circuit Court, Second Circuit. The District Court denied said application and proceeded with the petition of the Commission. The Commission offered no proof in support of its petition other than the record of the Commission which was objected to by petitioner and received by the Court over petitioner's objections. Thereafter petitioner sought to call a witness in support of his objections before the said District Court to which very strenuous objections were made and after almost two hours of oral argument petitioner was permitted to have his witness sworn. A half hour thereafter the proceeding was adjourned until October 3rd, 1944.

On October 2nd, 1944, the Commission made its motion before the Court below to dismiss petitioner's petition for

review of the Commission's order dated September 7th, 1944 on the grounds that the order of the Commission provides that it shall not be operative to authorize the consummation of any transactions proposed in the plan until an appropriate District Court shall, upon application of the Commission, enter an order enforcing the plan so approved; that such an application had been made to the District Court, as aforesaid, and that by reason thereof, the Commission contended that the Circuit Court under Section 24(a) of the Act could not review the order of the Commission but that the petitioner was compelled to seek a review of the Commission's order in the District Court in the so-called enforcement proceedings, and to resort to appeal from any order of the District Court under Section 225 of the Judicial Code (R. 55-85). Petitioner opposed this motion and contended that the only Court which has jurisdiction under the Act to review the order of the Commission and to grant a petitioner mandatory relief as provided in Section 24(a) of the Act, is the Circuit Court of Appeals (R. 86-93).

On October 3rd, 1944 on reconvening of the said hearing in the District Court, the District Judge directed over objections of this petitioner, that his witness withdraw from the witness stand without being permitted to answer any further questions and the District Court refused petitioner the right to have other witnesses present in the courtroom, to be sworn, and then directed that the hearing be closed.

On October 24, 1944, the lower Court rendered its opinion (R. 93-100) granting the motion of the Commission to dismiss the petition of the petitioner to review the Commission order stating (R. 100):

> "We conclude, therefore, that petitioner must be referred to the District Court for the District of Delaware for the protection of such rights as he may have in the premises, and that the motion to dismiss the petition for review must be granted. The petition for review is, therefore, dismissed."

The Questions Presented

1. Does the immediate commencement by the Commission of a statutory District Court proceeding at the request of declarant companies to obtain a court order enforcing the plan approved by a Commission order as provided in Section 11(e) of the Act, deprive a Circuit Court of statutory jurisdiction under Section 24(a) of the Act to review the said order of the Commission on the petition of an aggrieved investor and to grant to such petitioner the mandatory relief provided for in said Section 24(a)?

2. Is not the Commission's order to the extent that it approved the declaration of Bond and Share for the use of the $44,000,000 in the acquisition of its preferred stock and the terms and conditions of said order applicable to said acquisition solely reviewable in the Circuit Court of Appeals as provided in said Section 24(a) of the Act?

Specification of Error to be Urged.

The Circuit Court of Appeals for the Second Circuit erred in holding that it had no jurisdiction under Section 24(a) of the Act to review the order of the Commission and to grant the mandatory relief prayed for in the petition.

Reasons Relied on for Grant of Writ

(1) Whether an aggrieved investor affected directly and adversely by an order of the Commission approving a plan under Section 11(e) of the Act and authorizing the use of $44,000,000 of his company's assets, can be deprived of his statutory authority under Section 24(a) of the Act to have a Circuit Court of the circuit wherein he resides or has his principal place of business, review the said Commission order and grant the mandatory relief therein provided for, by the Commission immediately after entering its said order applying to a distant District Court for an order, at the request of the declarant companies, enforcing and carrying out the said plan, is a vitally important Fed-

eral question drastically affecting the interests of millions of investors scattered all over the United States who have billions of dollars invested in companies subject to the regulations of the Act, is a question which seriously involves the administration of the Act, has not been but should be settled by this Court.

(2) The Court below in dismissing the petition for review on the ground that the institution of the District Court proceedings by the Commission, at the request of the declarant companies, for an order under Section 11(e) enforcing and carrying out a plan approved by the Commission order, ousted the Court below of its jurisdiction under Section 24(a) of the Act to review the said Commission order, has misconstrued the statutory provisions of Sections 24(a) and 11 and their intent and purport, and the decision of the Court below is in conflict with the decisions of this Court and the decisions of other Circuit Courts of Appeals.

(3) A real question of deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States is presented in the instant case, as the petitioner by the decision below has been denied judicial review of an administrative order which deprives him of substantial property.

Wherefore, for the reasons stated above and discussed more fully in the annexed brief, your petitioner prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, to the end that the above cause may be certified to and reviewed and determined by this Court and that the judgment of said Circuit Court of Appeals in the above-entitled cause may be reviewed by this Court, and your petitioner prays for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

Samuel Okin,
Attorney for Petitioner.

May 5th, 1945.

BRIEF IN SUPPORT OF PETITION

[For index, table of cases, table of statutes, reference to opinion below, jurisdictional statement, statement of the case and specification of error, reference is made to the petition.]

I. The immediate commencement by Commission of Statutory District Court proceeding at request of declarant companies to obtain court order enforcing a plan approved by order of Commission as provided in Section 11(e) of Act, does not deprive a Circuit Court of Statutory Jurisdiction under Section 24(a) of Act to review said Commission order on petition of aggrieved investor and grant mandatory relief as provided in said Section 24(a).

The Court below, it is submited, misconstrued the provisions of Sections 11 and 24(a) of the Act and erred in dismissing the petition of an aggrieved investor to review the order of the Commission purporting to be made pursuant to Section 11(e) of the Act approving a plan filed by United Gas and joined in by Bond and Share and Electric.

On September 7th, 1944 the Commission made its order approving said plan and on September 8th, 1944, pursuant to a request of said companies contained in the said plan, the Commission filed a petition in the District Court of Delaware for an order enforcing said plan under Sections 11(e) and 18(f) of the Act.

The petitioner filed a petition in the Court below to review the order of the Commission and for certain mandatory relief as authorized by Section 24(a) of the Act.

The Commission moved to dismiss the petition because of the proceedings pending in the District Court, which motion the Court below granted.

In dismissing the petition, the Court below has deprived petitioner of the only statutory review of the Commission order which is provided for by the Act. Only Section 24(a) of the Act authorizes any review of a Commission order and no such review can be obtained in any proceeding under Sections 11(e) and 18(f) for an order enforcing any such plan approved by the Commission when such order is requested by declarant companies.

The District Court in any such enforcement proceeding has no statutory authority to review the Commission order or to grant the mandatory relief provided for in Section 24(a) of the Act, but can only make an order enforcing and carrying out the terms and provisions of such plan, if, upon such application and after notice and opportunity for hearing, it finds that such plan is fair and equitable and appropriate to effectuate the provisions of Section 11, and can assert such further equitable jurisdiction as provided in said Section 11(e).

The determination of the Court below, it is submitted, is apparently predicated upon the theory that the filing of the petition for review of the Commission order created a conflicting situation with the proceedings pending in the District Court requiring an interpretation of the Act to the extent that no review of the Commission order approving the plan could be obtained in a Circuit Court as provided in Section 24(a) of the Act where the Commission had instituted at the request of the companies, a District Court proceeding for an order enforcing the plan and carrying out its provisions.

The provisions for review of Commission orders under Section 24(a) and the proceedings in the District Court for the enforcement of a voluntary plan of reorganization, serve entirely different purposes and any interpretation that they conflict is predicated on a misconstruction of the Act.

The Court below said (R. 95, 96, 97):

"The motion to dismiss is based on the contention that jurisdiction to review the plan and all objections to it is now vested in the United States District Court for the District of Delaware, wherein the Commission filed a petition for enforcement of the plan on September 8, 1944.

* * * * * *

The Commission relies, however, on the provisions of section 11(e) of the same Act, 15 U. S. C. A. sec. 79k(e), which, after giving jurisdiction to the Commission to pass upon a plan for the reorganization of any subsidiary company of a registered holding company, states that the Commission may, in accordance with section 18(f) of the Act, 15 U. S. C. A. sec. 79r(f), apply to the district court of the United States for the proper district to 'enforce and carry out the terms and provisions of such plan'.

* * * * * *

It is the Commission's contention that the general provision for review of Commission orders at the behest of a single person must yield to the particular authority given a single district court to pass upon the provisions of a plan as fair and equitable and to enforce it. As supporting this view, it refers to not only the statute above quoted, which makes the approval of the district court a condition precedent to enforcement of the plan but also the terms of its own order making the plan 'operative' only upon the entry of an enforcement order by the appropriate district court. Hence it says that both by fair interpretation of the statute and by express terms of the order of which review is sought, it is as yet merely interlocutory, lacking the finality necessary for immediate review, and further that petitioner does not now show himself 'aggrieved' by any order of the Commission. And if

and when the district court, which is now conducting hearings, does enter an enforcement order, then all parties in interest will have their usual rights of appeal therefrom.

The broad terms of review accorded by section 24(a) of the Act of course show a general legislative intent to give parties aggrieved by Commission orders the opportunity to present their case for review to the circuit court of appeals of their own circuit, and there is no exception in terms for orders which must be brought for enforcement to a district court. Thus, the situation here presented appears to be one not directly contemplated by the law makers. It seems clear, however, that a rational interpretation of the entire statute must support the Commission's view if all parts of it are to be given due weight and application, and a consistent and workable scheme of enforcement, as well as of review is to be applied. The provisions of section 11 compel full review of an order such as this in a district court for all parties in interest, thus making limited reviews for single parties in interest in other courts quite intolerable for the conflict in jurisdiction which must result; and the broad scope of review stated in section 24 becomes in terms inapplicable because of the interlocutory nature of the Commission's action in the circumstances."

In referring to the provisions of 11(e) of the Act, this Court said in *Securities and Exchange Commission* v. *Chenery Corp., et al.*, 318 U. S. 80, 91, 94:

"The Act vests in the officers and directors of a holding company registered under the Act broad powers as representatives of all the stockholders. Besides the Commission, only the management can initiate a proceeding before the Commission to simplify the corporate structure and to effect a fair and equitable dis-

tribution of voting power among security holders. Only the management can amend a plan under secs. 7 and 11(e), and this it may do at any time; only the management can withdraw the plan, and this too it may do at will; and even after the Commission has approved a plan, it cannot be carried out without the consent of the management.

* * * * * *

Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us."

In the *Chenery* case (*supra*) the Commission made an order approving a modified plan filed under Section 11(e) of the Act which order was reviewed under Section 24(a) of the Act on the petition of an aggrieved person and the resulting order of the appellate court was thereafter reviewed by this Court. In that case the company involved did not request the Commission to institute any proceeding for an order enforcing and carrying out said modified plan.

In *Marquis and Company* v. *Securities and Exchange Commission*, 134 F. (2d) 265, 822 (C. C. A. 3, 1943), a petition was filed by an aggrieved person under Section 24(a) of the Act to review the order of the Commission approving a plan filed under Section 11(e) for the reorganization of the Columbia Oil and Gasoline Corporation. In that case the plan of reorganization did not request the Commission to institute any proceeding in the District Court to obtain an order of the Court enforcing the same but the company endeavored to consummate the plan by obtaining voluntary approval of the stockholders. After the Commission filed its certified record as provided in Section 24(a) of the Act with the said Third Circuit, the companies requested the Commission to institute a District Court proceeding for an order enforcing and carrying out the said plan under Sections 11(e) and 18(f), which the Commis-

sion did, and thereafter the Commission moved before the Circuit Court to stay its proceedings pending action by the District Court, which motion was denied without opinion.

In *City National Bank & Trust Co.* v. *Securities and Exchange Commission*, 134 F. (2d) 65 (C. C. A. 7) and *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. (2d) 274 (C. C. A. 2), certiorari denied, 318 U. S. 786, the Courts reviewed orders of the Commission approving plans filed under Section 11(e) when petitions were presented by aggrieved persons under Section 24(a) of the Act. In these cases the plans as approved by the Commission were apparently consummated without resorting to any enforcement proceeding as authorized by said Section 11(e).

The only construction which can be placed upon the opinion of the Court below is that the institution of the enforcement proceedings and the insertion in the Commission order that (R. 66):

> "IT IS FURTHER ORDERED that this order shall not be operative to authorize the consummation of any transactions proposed in the Plan until an appropriate United States District Court shall, upon application of the Commission, enter an order enforcing the Plan herein approved."

have ousted the Circuit Court of jurisdiction of a petition duly filed under Section 24(a) of the Act. It would indeed be anomalous if the Commission could, by inserting in its order an unnecessary provision (supra) and thereafter instituting District Court proceedings at the voluntary request of the declarant companies, thereby circumvent the statutory provisions for review of Commission orders and thus prevent the use of Courts by Congress to vindicate the public interest in the statute, protect the substantial interests of investors and curb any excessive assertion of statutory power by the Commission.

Section 11(e) authorizes the Commission to make an order approving a voluntary plan filed thereunder if, after notice and opportunity for hearing, the Commission finds such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan. The Commission has no authority under this subsection to make any conditional order making its approval of the plan subject to any order of a District Court enforcing any such plan. The attempt to insert in the Commission order any such superfluous provisions is not only wholly ineffectual but obviously intended solely for the purpose of circumventing the statutory provisions for review of Commission orders under Section 24(a) of the Act and the granting of the mandatory relief as provided in said section. The insertion by the Commission in its order of the aforesaid wholly unnecessary attempted conditional provisions, has absolutely no statutory significance and should be treated as though they had never been inserted in said Commission order. When the Commission saw fit under Section 11(e) of the Act to approve the plan, such approval expended its statutory power and the insertion of the alleged conditional provisions in no way made the said Commission order interlocutory. The order of the Commission was in all respects final and required no further action on the part of the Commission. The fact that any company in attempting to consummate the plan as approved by the Commission, found it necessary at any time either before or after such Commission approval to request the Commission to apply to a District Court for an enforcement order as provided in Section 11(e), does not in any way change the finality of the Commission order.

The decision of the Court below resulted from its acceptance of the Commission contention that under Section 11(e) the approval by a District Court of the plan filed thereunder is a condition precedent which makes the order of the Commission, particularly where it contains such conditional

provisions, merely interlocutory and not reviewable under Section 24(a), and aggrieved persons must resort to the District Court proceedings to protect their interests. The contentions of the Commission are without basis in statute and the lower Court erred in accepting the same.

As this Court said in the *Chenery* case (*supra*), the Act authorizes a management of a company to withdraw at will, a plan filed by it under Section 11(e) even after the Commission has approved it and this plan cannot be carried out without the consent of the management.

Section 11(e) does not require that an order of the Commission approving a plan filed thereunder is in any manner subject to a subsequent enforcement order of a District Court. Any plan filed under Section 11(e) does not require that the company request the Commission to obtain an enforcement order.

The only interpretation which can properly be placed upon Section 11(e), it is submitted, is that any plan approved by the Commission may thereafter be voluntarily consummated by the act of the stockholders of the company or other persons affected thereby, and that in the event that the management of the company find that they are unable to obtain the voluntary approval of such plan by the persons affected thereby, the company involved is permitted by statute to request the Commission to apply for an enforcement order from a District Court as provided in said Section 11(e).

It is thus obvious that the subsequent proceeding in a District Court as provided in Section 11(e) does or does not take place dependent solely upon whether the persons affected by such plan accept the same voluntarily or refuse to do so. In any event, however, the subsequent proceeding in the District Court is wholly distinct from the proceedings before the Commission, Congress merely having provided that if the stockholders or other persons affected re-

fuse to approve the plan after the Commission has made its order doing so, a Court is empowered to conduct a hearing as to whether it will compel the persons affected by such plan to abide by the same and carry it out.

Thus it is apparent that Congress has provided two separate and distinct steps under Section 11(e) of the Act with respect to a voluntary plan filed by a company for reorganization, neither one of which is dependent on the other, except that the proceedings in a District Court can only take place after the Commission has made its order approving the plan. Even the findings to be made by the Commission and the Court are different under Section 11(e). Under this Section the Commission is empowered to make an order approving the plan if it finds such plan *necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected thereby; whereas* the Court under said Section is authorized to make an order enforcing and carrying out the terms and provisions of such plan, if upon application by the Commission, at the request of the company, it shall approve said plan *as fair and equitable and as appropriate to effectuate the provisions of section 11.*

Thus while the Commission may approve the plan if it finds same fair and equitable and necessary to effectuate the provisions of subsection (b), the Court must not only find that the plan is fair and equitable but that it is appropriate. While the Commission thus may think the plan necessary, the Court while agreeing with the Commission that it is necessary must nevertheless find that it is appropriate. The terms "necessary" and "appropriate" are not synonymous.

It is important to note that the Court below apparently disregarded the important fact that the Order of the Commission not only approved the plan filed by United Gas and joined in by Bond and Share and Electric, but also approved the use of the $44,000,000 in cash contemplated to

be received by Bond and Share and intended by it to be used in the acquisition of its preferred stock, and in approving such use the Commission order attaches conditions detrimental to investors who own stock in Bond and Share.

Assuming, for the purpose of argument, that an aggrieved person cannot obtain a review under Section 24(a) of the Act of an order of the Commission approving a plan filed under Section 11(e), it is wholly impossible to understand upon what construction of the Act, any one can contend that an aggrieved person is similarly to be deprived of a review under said Section 24(a) of the order of the Commission approving a Declaration of Bond and Share under Section 12(c) with respect to said $44,000,000, as aforesaid, merely because the Commission directed a consolidated proceeding, as aforesaid, and thereafter made a consolidated order. Certainly the matters involved are wholly distinct.

The lower Court apparently concluded that in the proceedings in the District Court, an aggrieved person can obtain a review of the Commission order and the other relief provided for in Section 24(a). It is impossible, it is submitted, to justify any such conclusions upon an examination of the provisions of the Act with respect to the jurisdiction of the District Court. Its sole authority is to make an enforcement order under certain circumstances. The Act does not empower the District Court to set aside, modify, affirm, in whole or in part, the Commission order as provided in Section 24(a), nor does it empower the District Court to grant the mandatory relief as provided in Section 24(a) or the stay as provided in Section 24(b).

This Court is empowered to review upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347) the order of the Circuit Court under Section 24(a) affirming, modifying or setting aside, in whole or in part, any such order of the Commission before the Court for re-

view. There is no such provision in the Act with respect to the District Court but only as to the Circuit Court.

The conclusion of the lower Court that because the provision appears in subsection (b) of Section 11, i. e.:

"Any order made under this subsection shall be subject to judicial review as provided in section 24."

and such provision does not appear in subsection (e) of Section 11 and therefore any Commission order under subsection (e) is not reviewable under Section 24(a), is not tenable under any construction of said Sections 11 and 24(a).

Under Section 11, the Commission was directed under subsection (a) thereof to make certain examination; under (b)(1) to require the limitation of certain operations; under (b)(2) to simplify a holding company structure or to fairly and equitably distribute voting power; under subsection (c) the company was given one year to comply with the order made under subsection (b) with a possible extension of another year; under subsection (d) the Commission was authorized to go to Court to compel compliance with its order under subsection (b); under subsection (e) a company was authorized to file a plan for voluntary compliance with the Commission's order under subsection (b) or for voluntary compliance with said subsection (b) in advance of any such order of the Commission; subsection (f) refers to the appointment of a receiver or trustee for any registered holding company in any proceeding in a Court of the United States under Section 11 or otherwise, or with respect to any subsidiary; subsection (g) refers to solicitation of investors.

It is apparent from the foregoing that subsections (c), (d) and (e) are interwoven with subsection (b) and it is impossible, it is submitted, to so construe subsection (e) so as to conclude that only orders under subsection (b) shall be reviewable under Section 24(a) and not orders under subsection (e). The construction of the lower Court to the contrary, it is submitted, was error.

Likewise, it is submitted, the conclusions of the lower Court that because of the colloquy in Congress respecting Section 77 of the Bankruptcy Act relative to the relationship thereunder of the Interstate Commerce Commission and the District Court wherein the Interstate Commerce Commission acts in an advisory capacity to the District Court, that therefore the Securities and Exchange Commission under Section 11(e) of the Public Utility Holding Company Act of 1935 acts in a similar capacity and that its orders under subsection (e) are not reviewable under Section 24(a), is, it is submited, without foundation in the Act. The Securities and Exchange Commission in making its order under subsection (e) of Section 11 does not act in an advisory capacity similar to the action of the Interstate Commerce Commission in making its report to a District Court under section 77 of the Bankruptcy Act relative to a railroad which is the subject matter of a bankruptcy or reorganization proceeding in a District Court. Under the Bankruptcy Act, the role played by the Interstate Commerce Commission is not the same as that authority granted to the Securities and Exchange Commission under Section 11(e) of the Public Utility Holding Company Act of 1935.

The reference by the lower Court in its opinion to the debate with respect to subsection (f) does not justify, it is submitted, its conclusion that the Act does not provide for review under Section 24(a) of orders of the Commission made under subsection (e) of Section 11. The debate with respect to subsection (f) dealt solely with the question as to whether the provisions of subsection (f) would interfere with the jurisdiction of the District Court with respect to the appointment of a receiver or trustee, and was not intended to indicate any legislative intent that orders of the Commission under subsection (e) should not be reviewable under Section 24(a).

It is submited that the conclusion of the lower Court, that the order of the Commission is reviewable by the district court under Section 11(e) is without any basis in the

Act and that the jurisdiction of a district court in any enforcement proceeding under subsection (e) of Section 11 is limited wholly to that subsection.

The further conclusion of the lower Court that an aggrieved person must forego the statutory right under Section 24(a) of filing his petition in the Circuit Court where he resides or has his place of business, and must go to some distant Court to protect his interests and those of the other investors involved, it is submited, is also contrary not only to the expressed intent of Congress, but also to the decision of this Court in construing similar provisions in the Communications Act of 1934, and the legislative history with respect to same.

In *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U. S. 4, 15, this Court said:

> "It is urged that the orders reviewable under section 402(a), as to which the power to grant stays is undeniable, are intrinsically different from those reviewable under section 402(b). But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform. For example, if the Commission on its own motion modifies a station license, review is had under section 402(a) in the appropriate district court. However, if it grants an application for modification of a license, an appeal lies under section 402(b) to the Court of Appeals for the District of Columbia. Both cases give rise to the same kind of issues on appeal. Both orders are equally susceptible of being stayed on appeal. As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in

situations where the Commission's order arose out of a proceeding not instituted by the licensee.''

The legislative history of the Communications Act of 1934, referred to in the foregoing decision (*Scripps-Howard* case, *supra*) with respect to similar review provisions is of importance.[1]

The legislative history of the Public Utility Holding Company Act of 1935 and its expressed intent and purpose (sec. 1), makes it very apparent that when Congress provided in Section 24(a) of the Act that an aggrieved person might seek review of a Commission order in the Circuit

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[1] Remarks of Senator Dill in charge of the measure in the Senate, 78th Cong. Rec. 8825, 73rd Cong. 2nd Sess. in referring to Section 402 of the Communications Act of 1934:

"I desire to call attention to what I think is an important fact to consider in this appeal provision. Those owners of radio broadcasting stations living long distances from the District of Columbia should not be required to come to Washington to prosecute an appeal from a decision for which they were not responsible. When I say 'were not responsible' I mean a decision which was granted against them or affecting them when they did not bring the case into court. A station owner who lives in the Rocky Mountain area, or who lives in the far West, and who is compelled to come to the District of Columbia to prosecute his appeal, finds himself faced with the expense of from $400 to $500 for the mere trip of coming here, an equal amount for his attorney, if he brings one, and then the attorney fees in addition. I say of personal knowledge that some of the station owners have found it almost impossible to finance appeals in that way. So we provide that where the decisions of the Commission are made in cases wherein the stations took no part in beginning the suits, appeal may be taken in the three-judge district courts in the jurisdictions where the stations are located. But in the case where the applicant for the license or permit, or whatever it may be, comes to the Commission and asks for a change in his license or asks for a new license, or asks for something to be done by the Commission, then if the Commission makes a decision from which he desires to appeal he must make his appeal in the courts of the District of Columbia.

In other words, if the station owner has money enough to come here in the beginning to prosecute his case before the Commission, it is fair to assume that he has money enough to continue the appeal here."

Court in the circuit in which such aggrieved person resides or has his principal place of business, that Congress was being just as solicitous in 1935 with respect to the investors scattered all over the United States whom Congress so diligently was seeking to protect, as it was in 1934 when it made appeals convenient for stations.

II. The Commission's order to the extent that it approved the declaration of Bond and Share for the use of $44,000,000 in the acquisition of its preferred stock and attached certain terms and conditions thereto can only be reviewed under Section 24(a) of the Act.

Bond and Share filed a separate application for the use of the $44,000,000 which it was to receive from United Gas under the plan hereinbefore referred to. The Commission consolidated the hearing with respect to this declaration with the hearing with respect to the plan and thereafter made its consolidated order (Appendix A), which was the subject matter of the petition in the Court below, wherein the Commission approved the separate declaration of Bond and Share.

The lower Court in its opinion makes no reference to this phase of the order.

When the plan was filed by United Gas and joined in by Bond and Share and Electric, and request made therein by said companies that the Commission apply for an enforcement order with respect to the plan in the event that the Commission approves the plan, Bond and Share conditioned its approval of the plan upon the approval by the Commission of the separate declaration of Bond and Share to use the $44,000,000 which it was to receive under the plan. But this application for the use of the $44,000,000 was a separate and distinct application bearing a separate file number (File No. 70-868), and purported to be filed by Bond and Share under Section 12(c) of the Act.

Obviously any objections which petitioner had to the order of the Commission with respect to this application of Bond and Share could only be reviewed by the Circuit Court under Section 24(a) and the District Court in the proceeding under Section 11(e) with respect to the plan of United Gas had no jurisdiction with respect to the said application of Bond and Share approved, as aforesaid, in the Commission order.

The said order of the Commission in approving said application of Bond and Share attached conditions and terms wholly without authority in law and beyond any jurisdiction of the Commission. The petition in the Court below sought to have the order also reviewed to the extent that it contained such provisions (R. 45-46, 53).

That petitioner is a person aggrieved within the provisions of Section 24(a) of the Act has been argued at length before this Court (No. 815, this Term).

It is submited that the lower Court also erred in dismissing the petition to the extent that it sought review as aforesaid, under Section 24(a) of the Act.

Conclusion

It is most important to investors in the United States that the Congressional authority granted to them under Section 24(a) of the Act to seek judicial review in a Circuit Court of the circuit wherein such investors reside or have their principal place of business to review any order of the Commission under the Act must remain inviolate and should not be withdrawn by an erroneous judicial decree.

It is respectfully submitted that the foregoing petition for writ of certiorari should be granted.

Respectfully submitted,

SAMUEL OKIN,
Attorney for Petitioner,
No. 32 Broadway,
New York City.

May 5th, 1945.

Appendix A

UNITED STATES OF AMERICA

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pa., on the 7th day of September, A. D., 1944.

In the Matter of

UNITED GAS CORPORATION
UNITED GAS PIPE LINE COMPANY
HOUSTON GULF GAS COMPANY

File No. 70-314

In the Matter of

ELECTRIC BOND AND SHARE COMPANY

File No. 70-315

In the Matter of

ELECTRIC BOND AND SHARE COMPANY
ELECTRIC POWER & LIGHT CORPORATION
UNITED GAS CORPORATION
HOUSTON GAS SECURITIES COMPANY
UNITED GAS PIPE LINE COMPANY
HOUSTON GULF GAS COMPANY

File No. 59-21

(Public Utility Holding Company Act of 1935 Sections 11(b)(2), 12(b), 12(c) and 12(f))

In the Matter of

INVESTIGATION OF ORGANIZATION AND FINANCING OF UNITED GAS CORPORATION., ETC.

File No. 4-33

(Public Utility Holding Company Act of 1935 Sections 18(a) and 18(b))

ORDER APPROVING PLAN PURSUANT TO SECTION 11(e) PERMITTING DECLARATIONS TO BECOME EFFECTIVE AND GRANTING APPLICATIONS

In the Matter of

UNITED GAS CORPORATION
ELECTRIC POWER & LIGHT CORPORATION
ELECTRIC BOND AND SHARE COMPANY

File No. 54-91

In the Matter of

ELECTRIC BOND AND SHARE COMPANY

File No. 70-868

(Public Utility Holding Company Act of 1935)

United Gas Corporation ("United") having filed with the Commission an application for approval of a Plan, as amended (hereinafter referred to as the "Plan"), pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 (the "Act") and Electric Bond and Share Company ("Bond and Share") and Electric Power & Light Corporation ("Electric") having joined in said Plan with respect to all transactions affecting them provided for therein; and

United, Bond and Share and Electric having requested the Commission pursuant to Section 11(e) of the Act, if it approved the Plan, to apply to a Court in accordance with the provisions of sub-section (f) of Section 18 of the Act to enforce and cary out the terms and provisions of said Plan; and

Bond and Share having filed a declaration under Section 12(c) of the Act seeking approval of the use of all or any part of the cash proceds to be received by it under the Plan for the acquisition and retirement of its preferred stocks and having conditioned its joinder in the Plan upon the issuance of an order of the Commission permitting said declaration under Section 12(c) to become effective; and

United and certain of its subsidiaries having filed a joint application and declaration pursuant to Sections 6, 7, 9(a), 10 and 12 of the Act for approval of a series of transactions incident to the refinancing of United (File No. 70-314), and in connection with the filing of said Plan having filed an amendment to the joint application and declaration to provide for the issuance and sale of $100,000,000 principal amount of First Mortgage and Collateral Trust Bonds and the use of the proceeds of such sale for the redemption of its publicly held $7 preferred stock, the purchase of a portion of its outstanding second preferred stock and the redemption of the publicly held 5% Collateral Trust Gold Bonds assumed by United, as contemplated in said Plan and for the issuance and sale by United Gas Pipe Line Company, a wholly-owned subsidiary of United, of $23,000,000 principal amount of its First Mortgage Bonds, all of which will be issued to United in exchange for a like principal amount of United Gas Pipe Line's 6% Debentures owned by United which debentures will be cancelled; and

The Commission having on March 6, 1944 issued its Notice and Order for Hearing on said application and Plan under Section 11(e) on said declaration under Section 12(c) and having directed the consolidation of the proceedings thereon with each other and with a prior consolidated proceeding involving, among other matters, applications and declarations under Sections 6, 7, 9(a), 10 and 12 of the Act for the refinancing of United and proceedings instituted by the Commission under Sections 11(b)(2), 12(b), 12(c), 12(f), 18(a) and 18(b) of the Act (File Nos. 70-314, 70-315, 59-21, 4-33); and

A copy of said Notice and Order for Hearing on March 6th, 1944 having been mailed to all security holders of the applicant (insofar as the identity of such security holders was known or available), notice having been duly given to all interested persons, all persons having been given an opportunity to be heard with respect to all matters per-

taining to said proceedings, public hearings having been held, the staff of the Public Utilities Division of the Commission having prepared and filed a draft of the proposed Findings and Opinion and having recommended its adoption by the Commission, copies of the draft of the proposed Findings and Opinion having been served on all parties and persons who appeared and participated in the proceedings, an opportunity having been afforded to each of them to file a written statement of objections to all or any part thereof, briefs and answering briefs having been filed and the Commission having heard oral argument, and the Commission having this day issued and filed its Findings and Opinion herein; and

United, Bond and Share and Electric having requested that the Commission's order conform to and set forth the recitals specified in Sections 371 and 1808(f) of the Internal Revenue Code as amended;

IT IS ORDERED that the Plan be, and the same hereby is approved subject, however, to the condition that the applicants undertake to pay such fees and reimburse such expenses incurred or to be incurred in connection with said Plan, the transactions incident thereto and the consummation thereof, as are approved, allocated, or awarded by further order or orders of this Commission; and to the further conditions and reservations hereinafter set forth.

IT IS FURTHER ORDERED that counsel for the Commission be, and they hereby are, authorized and directed to make application forthwith on behalf of the Commission to an appropriate United States District Court pursuant to the provisions of sub-section (f) of Section 18 of the Act to enforce and carry out the terms and provisions of the Plan.

IT IS FURTHER ORDERED that this order shall not be operative to authorize the consummation of any transactions proposed in the Plan until an appropriate United States District Court shall, upon application of the Commission, enter an order enforcing the Plan herein approved.

IT IS FURTHER ORDERED that the declaration of Bond and Share under Section 12(c) with respect to the acquisition of a portion of its outstanding $5 and $6 preferred stocks be, and the same hereby is, permitted to become effective forthwith subject to the terms and conditions prescribed in Rule U-24 and to the further terms and conditions that:

(1) All purchases shall be effected on the New York Curb Exchange except that the company may purchase large blocks of stock otherwise than on said Exchange provided that notice of intention to effect each such purchase together with a statement of the identity of the seller, the price proposed to be paid and any fees or commissions to be incurred in connection therewith shall have been given to the Commission and the company shall not have been informed by the Commission that it intends to issue an order to show cause why such purchase should not be consummated. The company shall not solicit or cause to be solicited the sale of any shares to the company either on or off the said Exchange;

(2) The company shall furnish to the Commission promptly at the end of each week a report showing the number of shares of each class of preferred stock purchased each day during the week, the prices at which they were purchased and the names of the brokers through whom they were purchased;

(3) The company shall include in its quarterly reports to stockholders information as to the total number of shares of each class purchased and the aggregate purchase price for each class;

(4) No purchase shall be made after twelve months from the date of the receipt of the cash under the Plan subject, however, to the right of the company to apply for an extension or extensions of such period;

(5) The company shall advise by letter the holders of record of its preferred stock fully with respect to its in-

tention to make such purchases and the method to be employed and the Commission reserves jurisdiction with respect to the form and contents of such notice and any similar communications;

(6) All shares of preferred stock acquired by the Company pursuant to the present declaration and order shall be retired and cancelled;

(7) The company shall have the right to file substitute or additional programs with respect to the use of all or any portion of the funds which are the subject of the application, and jurisdiction is hereby reserved to require the company to make such filings or to take such other action as may be necessary or appropriate under the provisions of the Act; and

(8) The Commission reserves jurisdiction in its discretion to rescind or modify its order, any such rescission or modification to be applicable to such portion of the cash permitted to be employed for such purchases pursuant to the proposals herein as shall not have been previously expended.

IT IS FURTHER ORDERED that the joint application and declaration of United and the United Gas Pipe Line Company, as amended, with respect to the issuance of $100,000,000 principal amount of First Mortgage and Collateral Trust Bonds, under Sections 6, 7, 9(a), 10, 11(b), and 12 of the Act be, and the same hereby is, granted and permitted to become effective, except as to the issues concerning the terms and conditions of the Bonds proposed to be issued and sold by United and United Gas Pipe Line Company and the fees and expenses to be incurred in connection with said proposed issuance and sale as to which matters jurisdiction be, and the same hereby is, specifically reserved, subject, however, to the terms and conditions contained in Rule U-24.

IT IS FURTHER ORDERED that jurisdiction be, and it hereby is, reserved:

(1) To consider, determine and take appropriate action with respect to all issues involved in United Gas Corporation, et al., File Nos. 70-314, 70-315, 59-21 and 4-33, except those disposed of herein;

(2) To entertain such further proceedings, to make such further and supplemental findings and to take such additional action as may be found to be appropriate in the premises in connection with the said Plan and the several transactions incident to the consummation thereof:

IT IS FURTHER ORDERED that the issues, distributions, transfers, and exchanges of securities, and the transactions, specified and itemized below all as provided by the Plan are necessary or appropriate to the integration and simplification of the holding company system of which United is a member and necessary or appropriate to effectuate the provisions of subsection (b) of Section 11 of the Public Utility Holding Company Act of 1935:

(1) The sale and transfer by Bond and Share and the acquisition by Electric for a cash purchase price of $44,000,000 of all the claims in and against United held by Bond and Share as follows: $25,000,000 principal amount of 6% Debentures due 1953 of United Gas Public Service Company assumed by United; 6% demand note in the principal amount of $25,925,000; 6% open account of indebtedness of $2,000,000; 17,310 shares of $7 preferred stock, 752,666 shares of common stock, 151,005 option warrants for the purchase of common stock of United; and $440,000 principal amount of 5% Collateral Trust Gold Bonds of Houston Gas Securities Company assumed by United.

(2) The surrender by Electric and the acquisition and cancellation by United of 17,310 shares of $7 preferred stock of United together with all rights to accumulated and undeclared dividends thereon acquired by Electric from Bond and Share in the transaction described in paragraph (1) above.

(3) The redemption and cancellation by United of 432,512 shares of its $7 preferred stock at their redemption

price of $110 per share plus accumulated dividends thereon to the redemption date.

(4) The declaration, issuance and distribution by United of a dividend on its $7 second preferred stock, all of which is held by Electric, of 12,385,520 shares of its $1 par value common stock and the acceptance by Electric of such stock dividend in payment of $12,385,520 of accumulated and unpaid dividends on such stock.

(5) The surrender by Electric and the acquisition and cancellation by United of 444,680 shares of $7 second preferred stock of United together with all rights to accumulated and undeclared dividends thereon and the issuance and delivery to Electric in exchange therefor of 44,468,000 shares of the $1 par value common stock of United.

(6) The sale and transfer by Electric and the acquisition for cancellation by United in exchange for $44,000,000 in cash of 440,000 shares of second preferred stock of United having a stated value of $44,000,000 and together with the right to accumulated and unpaid dividends on such stock.

(7) The payment by Electric of the $44,000,000 received by it in the transaction described in paragraph (6) above to Bond and Share.

(8) The surrender by Electric and the acquisition by United as a contribution to capital of the securities and open account of indebtedness of United acquired by Electric from Bond and Share as described in paragraph (1) above together with option warrants for the purchase of 3,600,040 shares of common stock of United held by Electric exclusive of the 17,310 shares of $7 perferred stock of United previously surrendered as described in paragraph (2) above.

(9) The redemption and retirement by United of $3,460,000 principal amount of 5% Collateral Trust Gold Bonds of Houston Gas Securities Company due March 1, 1952 assumed by United.

(10) The issuance and distribution by United of 42,613,-209 shares of its $1 par value common stock as a common stock dividend of two-thirds of a share of $1 par value common stock on each share of such stock outstanding and the acceptance thereof by the common stockholders of United, and in connection therewith the transfer from capital surplus to stated capital of the sum of $42,613,209 to cover the capital liability to be represented by the additional shares of stock to be issued and to render such shares fully paid and non-assessable.

(11) The issuance and distribution by United of 10,653,-302.2 shares of $10 par value common stock and the transfer and exchange of such shares by United and its common stockholders for the outstanding 106,533,022 shares of $1 par value common stock of United or in exchange for scrip of United.

(12) The issuance, transfer and exchange of scrip of United and the issuance and transfer of $10 par value common stock of said company in exchange therefor to the extent necessary to carry out the plan.

(13) All other transfers and exchanges of common stock and scrip of United which are required in order to carry out the Plan.

(14) The revocation, abrogation and cancellation of all outstanding option warrants for the purchase of common stock of United.

(15) The issuance and sale by United of $100,000,000 principal amount of First Mortgage and Collateral Trust Bonds, and the issuance by United Gas Pipe Line Company of $23,000,000 principal amount of its First Mortgage Bonds, subject to the reservations and conditions hereinbefore set forth.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(SEAL)

Appendix B.

Statutes Involved

The Sections of the Public Utility Holding Company Act of 1935 (U. S. C., title 15) which are pertinent on this application, are as follows:

Section 1. (a).....(1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States;.....

(b).....it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers.....

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section,.....

Section 2.(a)(5) "Public-utility company" means an electric utility company or a gas utility company.

Section 2.(a)(16) "Security" means any note, draft, stock, treasury stock, bond, debenture,.....

Section 6 prohibits the issuance or sale of the securities of a registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly, except in accordance with a declaration effective under section 7 of the Act and with the order under said section permitting such declaration to become effective.

Section 7 provides for the filing of declarations by registered holding companies and their subsidiaries in respect of security transactions and the following provisions appear in subsection (c).

> The Commission shall not permit a declaration regarding the issue or sale of a security to become effective unless it finds that—

(1) Such security is.....(B) a bond (i) secured by a first lien on physical property of the declarant, or (ii) secured by an obligation of a subsidiary company of the declarant secured by a first lien on physical property of such subsidiary company, or (iii) secured by any other assets of the type and character which the Commission by rules and regulations or order may prescribe as appropriate in the public interest or for the protection of investors; .....; or

(2) such security is to be issued or sold solely (A) for the purpose of refunding, extending, exchanging, or discharging an outstanding security of the declarant and/or a predecessor company thereof or for the purpose of effecting a merger, consolidation, or other reorganization; (B) for the purpose of financing the business of the declarant as a public-utility company; (C) for the purpose of financing the business of the declarant, when the declarant is neither a holding company nor a public-utility company; and/or (D) for necessary and urgent corporate purposes of the declarant where the requirements of the provisions of paragraph (1) would impose an unreasonable financial burden upon the declarant and are not necessary or appropriate in the public interest or for the protection of investors or consumers; or

Section 9 makes it unlawful for registered holding companies and their subsidiary companies and certain persons to acquire securities and utility assets and other interests without the approval by the Commission under Section 10.

Section 10 provides for the approval of the acquisition of securities and utility assets and other interests by the Commission by the filing of an application and provides:

(b) If the requirements of subsection (f) are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

(1) such acquisition will tend towards interlocking relations or the concentration of control of public utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers;

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; or

(3) such acquisition will unduly complicate the capital structure of the holding-company system of the applicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system.

Section 11(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding company system of which such a company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* .....

(2) To require by order, after notice and opportunity for hearing, that each registered holding company and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

Section 11(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such

extension necessary or appropriate in the public interest or for the protection of investors or consumers.

Section 11(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of Section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b) the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

Section 11(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any

subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the commission, the assets so possessed.

Section 11(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making such appointment. In no proceeding under this

section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court .....

Section 12(c) It shall be unlawful for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to declare or pay any dividend on any security of such company or to acquire, retire, or redeem any security of such company, in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding-company systems, to safeguard the working capital of public utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

Section 18(b) The Commission upon its own motion or at the request of the State commission may investigate, or obtain any information regarding the business, financial condition, or practices of any registered holding company or subsidiary company thereof or facts, conditions, practices, or matters affecting the relations between any such company and any other company or companies in the same holding company system.

Section 18(f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United

States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond .....

Section 24(a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such

terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code as amended (U. S. C., title 28, secs. 346 and 347).

Section 25. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", ap-

proved February 9, 1893 (D. C. Code, title 18, sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

Section 26(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

Senate Report No. 621 of the Committee on Interstate Commerce which accompanied the said Public Utility Holding Company Act of 1935 in referring to Section 11 of the Act states (pp. 32-33):

"Subsection (b) makes it the duty of the Commission after notice and opportunity for hearing, (1) after January 1, 1938 (see subsection (c) below for possibility of extension), by order enforceable only in the Federal Courts of equity, to require each registered holding company, and each subsidiary thereof, to divest itself of any interest in or control over property or persons to the extent that the Commission finds necessary or appropriate to limit the operations of the holding company system of which

such company is a part to a single geographically and economically integrated public utility system and to such business as is reasonably incidental or economically necessary or appropriate to the operations of such system; (a) after January 1, 1938 (with the same possibilities of extension) to require each registered holding company, and each subsidiary company thereof, to be reorganized or dissolved whenever the Commission finds that the corporate structure or continued existence of such company unduly or unnecessarily complicates the structure of the holding company of which it is a part, or unfairly or inequitably distributes voting power among the holders of securities, or is detrimental to the proper functioning of a single geographically and economically integrated public utility system; and (3) promptly after January 1, 1940, to require each registered holding company to take such steps as the Commission finds necessary or appropriate to make such company cease to be a holding company, except the Commission is directed to permit a registered holding company to be a holding company, ...

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Subsection (c) provides that in any order under subsection (b) the Commission shall fix the time within which such order shall be complied with, not later than one year from the date of such order, but the Commission may, for good cause shown, extend such time for an additional period not exceeding 1 year.

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Subsections (d), (e) and (f) outline the procedure whereby the reorganization plans must be approved by the Commission and carried out under the supervision of the Federal Courts.

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Subsection (e) expressly authorizes a holding company subject to the approval of the Commission and the court to

work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization by the Commission, and the Commission and the court are authorized to approve any plan so worked out voluntarily by a holding company as the Commission and the court might order under their compulsory powers.

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These provisions are framed to bring back to the investor such property interest as he may have in the underlying properties owned by the holding company. They destroy and confiscate no property but they remove the confusing corporate devices and contrivances which have confused the investor and in many cases have been used to deprive him of the fruits of his investment."

Said Senate Report No. 621 in referring to Sections 12 and subsection (c) thereof and 13 of the Act stated (p. 34, 35):

"Complete regulation of intercompany transactions is provided to prevent the milking of operating companies in the interests of the controlling holding company groups. Section 13 below deals specifically with service, sales, and construction contracts within holding-company systems. Section 12 covers other intercompany transactions detrimental to operating companies. The range of practices which this section attempts to reach is broad because unless appropriate discretion is given to the Commission, new devices will spring up and may result in nullifying the provisions of title 1.

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Subsection (c) makes it unlawful for any company in a holding company system to declare or pay any dividend or to acquire or redeem any of its own securities in contravention of such rules, regulations or order as the Commission may prescribe to protect the financial integrity of such companies, to safeguard their working capital or to prevent

the payment of dividends out of capital or unearned surplus. The exaction of excessive dividends from subsidiary operating companies may be even more harmful than the taking of upstream loans."

Section 20 of the Stock Corporation Law of the State of New York:

"VOLUNTARY SALE OF FRANCHISE AND PROPERTY AND RIGHTS OF OBJECTING STOCKHOLDERS. A stock corporation, except a railroad corporation and except as otherwise provided by law, with the consent of the holders of record of two-thirds of its outstanding shares entitled to vote thereon may sell and convey its property, rights, privileges and franchises, or any interest therein or any part thereof; but franchises within the state may be sold only to a domestic corporation. Before such sale or conveyance shall be made such consent shall be obtained at a meeting of the stockholders called pursuant to section forty-five. Any stockholder not voting in favor of such proposed sale and conveyance may at any time prior to the vote thereon—or if notice of the meeting was not mailed to him at least twenty days prior to the taking of such vote, then within twenty days after the mailing of such notice—object to such sale and conveyance and demand payment for his stock, and thereupon such stockholder or the corporation shall have the right, subject to the conditions and provisions of section twenty-one, to have such stock appraised and paid for as provided in said section. Such objection and demand must be in writing and filed with the corporation."

The Certificate of Consolidation of Electric Bond and Share Company contains the following provisions:

"To purchase or otherwise acquire its own shares of stock (so far as may be permitted by law) and its bonds, debentures, notes, scrip or other securities or evidence of indebtedness and to hold, sell, transfer or reissue the same."

and further provides in paragraph numbered (g) thereof:

"The corporation from time to time may purchase any of its stock outstanding (so far as may be permitted by law) at such price as may be fixed by its Board of Directors or Executive Committee and accepted by the holders of the stock purchased, and may resell any stock so purchased at such price as may be fixed by its said Board of Directors or Executive Committee but in case the stock so purchased is subject to redemption, the price paid therefor shall not exceed the price at which it is redeemable."